84-1740

Office-Supreme Court, U.S.
FILED
MAY 2 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's published opinion was constitutionally privileged under the First Amendment.

II. Whether Respondent was a "limited-purpose public figure" for the purposes of the zoning controversy involving Petitioner's property.

III. Whether the evidence established clearly and convincingly that Petitioner knew that what he was publishing was false or that he had a reckless disregard for whether or not it was true.

IV. Whether Petitioner's constitutional guarantee of due process was violated, in the specific circumstances of this case, because Respondent exercised his peremptory strikes to create a jury without blacks.

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JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, James N. Fleming ("Petitioner" or "Fleming"), respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia rendered on February 1, 1985. That judgment, upholding the compensatory and punitive liability of Petitioner in this defamation action, abridges Petitioner's constitutional rights of free speech and due process. Petitioner seeks to vindicate those rights by way of this Petition for Writ of Certiorari.

OPINIONS BELOW

A copy of the Final Judgment Order in favor of W. Bedford Moore, III ("Respondent" or "Moore") entered by the Circuit Court of Albemarle County, Virginia, in the first trial of this case may be found at App. A.[1] In Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981), the Supreme Court of Virginia reversed the decision of the Circuit Court and remanded the case for a new trial (App. B).

The second trial of this case again resulted in a jury verdict for Moore (App. C). The Circuit Court of Albemarle County entered judgment on that jury verdict (App. E).

Fleming appealed to the Supreme Court of Virginia, asserting nine assignments of error. The Supreme Court of Virginia granted Fleming's appeal, but limited that appeal to four issues (App. F).[2] By opinion (App. G) and mandate

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1 Throughout his Petition, Petitioner will refer to the trial transcript as "(Tr. __)," to Moore's exhibits as "(PX __)," to his own exhibits as "(DX __)," and to the Appendices to this Petition as "(App. __)."

2 On September 5, 1984, Fleming filed with the United States Supreme Court a Petition for Writ of Certiorari seeking

(continued)

(App. H) dated February 1, 1985, the Supreme Court of Virginia upheld the compensatory and punitive liability of Fleming, but reversed as excessive both damage awards. The Supreme Court of Virginia directed the Circuit Court of Albemarle County to order Moore to accept a remittitur of "a substantial portion" of both the compensatory and punitive awards, or else submit to a new trial upon the issue of damages only.[3]

(continued from previous page)

review of two of the assignments of error raising federal constitutional issues over which the Supreme Court of Virginia declined to exercise jurisdiction. That Petition was denied on October 29, 1984, presumably because this Court found the Petition premature while potentially dispositive state law issues were pending before the Supreme Court of Virginia.

3 The jury in the second trial of this matter awarded Moore $100,000 compensatory damages, $250,000 punitive damages, and 12% prejudgment interest on the $250,000 award running from the date of the tort, January 16, 1976. Pursuant to the February 1, 1985, mandate of the Supreme Court of Virginia, the Circuit Court of Albemarle County held a remittitur hearing on April 16, 1985. The Circuit Court remitted the entire prejudgment interest award, one-third of the compensatory award, and one-third of the punitive award. Moore accepted without protest the total remitted damage award of $233,333.32. A final order embodying the action of the Circuit Court on remand has not been entered.

STATEMENT OF JURISDICTIONAL GROUNDS

Fleming properly presented his federal constitutional claims to both the Circuit Court of Albemarle County and the Supreme Court of Virginia. Although the Supreme Court of Virginia remanded the case to the Circuit Court, that remand was limited to the issue of damages only. The Supreme Court of Virginia's affirmance of compensatory and punitive liability constituted a final ruling on the federal constitutional issues involved in the affirmance of that liability, as well as on the federal constitutional issues over which the Supreme Court of Virginia declined to exercise jurisdiction. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-87 (1975). Petitioner invokes this Court's certiorari jurisdiction under 28 U.S.C. § 1257(3) (1970).

Fleming seeks review of (1) the Circuit Court's rulings on October 7, 1982, and April 21, 1983, holding that Fleming's published opinion was not absolutely protected under the First Amendment (App. I; D); (2) the Circuit Court's rulings on October 22, 1982, and April 21, 1983, holding that Moore was a private rather than a public figure (App. J; D); (3) the Circuit Court's ruling on April 21, 1983, holding that

Moore had clearly and convincingly proved actual malice on the part of Fleming (App. D); (4) the Circuit Court's ruling on April 21, 1983, holding that the striking by Moore of all the black jurors was not a violation of Fleming's Fourteenth Amendment right to due process (App. K; D); (5) the Circuit Court's Final Judgment Order entered and dated June 3, 1983 (App. E); and (6) the Supreme Court of Virginia's affirmance on February 1, 1985, of compensatory and punitive liability (App. G; H). This Petition for Certiorari was filed within 90 days of the Supreme Court of Virginia's decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and statutes relevant to the disposition of this case are:

1. Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

U.S. Const. amend. I.

2. [N]or shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

3. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . .

28 U.S.C. § 1257(3) (1970).

STATEMENT OF THE CASE

This libel case emerges from the wake of a heated zoning controversy involving Fleming's plans to develop near the Rivanna Reservoir in Albemarle County, Virginia, a 128-acre low-to-middle income housing project, known as "Evergreen." Fleming is a black resident of Charlottesville, Virginia, his lifelong home. Moore, the respondent, is a white,

tenured assistant professor in the Humanities Division of the School of Engineering at the University of Virginia.

Fleming and Moore first met in 1971. At that time, Moore discussed with Fleming the possibility of purchasing a strip of Fleming's property that adjoined Moore's 102-acre residential estate, "Shack Mountain" (Tr. 103-04).[4] The parties, however, never reached an agreement.

In November 1974, after Fleming presented his first plans for Evergreen ("Evergreen I") to the Albemarle County planning authorities for review and approval, Moore again raised the possibility of purchasing a portion of Fleming's adjoining land. At trial, Moore stated that he wanted this land "to relieve" a narrow corner of his property containing his driveway (Tr. 65). Fleming responded by providing a plat to Moore and by agreeing to meet with him in a week or ten days (Tr. 65). Moore, however, changed his mind about the purchase and decided he could not privately

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4 During the height of the public controversy surrounding the proposed Evergreen development, Shack Mountain, built in a Jeffersonian style, received recognition by both the Virginia Historic Landmarks Commission and the National Register for Historic Places (Tr. 58, 59, 108, 133-34).

negotiate with Fleming because Moore intended to oppose publicly Fleming's housing development (Tr. 65-66). Moore wrote Fleming, stating:

> I write you as a courtesy to say that I have not followed up that proposed meeting with you and your partners because I have realized upon looking further into the matter, that I could not negotiate with you gentlemen in good faith and then turn around and oppose your project in the public hearings--as I feel I must do for the good of my neighbors and the county as a whole.

(PX 4; Tr. 66-67).

While certainly not the only development close to the reservoir, Evergreen I generated a unique storm of controversy. Moore became one of the principal antagonists of Fleming's proposed project, according to Gerald E. Fisher, Chairman of the Albemarle County Board of Supervisors (Tr. 442). Moore also became a visible leader of the opposition to Evergreen I. He attended most of the public meetings on Evergreen, speaking at many of them (Tr. 72, 79, 83, 157, 300, 333).

James B. Murray, Moore's attorney at the time, characterized him as a leader of the opposition against Evergreen (Tr. 289). In fact, as noted above, Moore ended his

negotiations with Fleming regarding the purchase of a portion of the Evergreen property because Moore felt he had to oppose publicly Fleming's project "for the good of my neighbors and the county as a whole" (PX 4; Tr. 66-67).

Moore's public opposition to Evergreen I was successful. Despite the recommendation of the staff of the Planning Commission to approve Evergreen I subject to certain conditions, including downgrading the dwelling unit density (PX 12), the Albemarle County Board of Supervisors denied the special use permit application for the project on January 22, 1975 (DX 4).

After the defeat of Evergreen I, Moore continued as a public leader against development near his home on the reservoir. He spoke publicly at an August 1975 Board of Supervisors meeting in support of conservation zoning (1 dwelling unit per 5 acres) along the reservoir (Tr. 79). According to Moore, he "was speaking out for and urging that conservation zoning be put in this new planning, the whole way around the reservoir to protect it" (Tr. 80).

In November 1975, Fleming submitted new plans for a planned unit development, Evergreen II (Tr. 80).

Density, the major impediment to the approval of Evergreen I, was no longer a problem. Fleming planned Evergreen II for 2.46 dwelling units per acre—within the Planning Commission staff's recommended density level and within the level specified in the County's Comprehensive Land Use Plan (PX 8).

Moore nevertheless continued to oppose Evergreen (Tr. 81). He attended four public meetings on Fleming's project: two held by the Planning Commission and two by the Board of Supervisors (Tr. 83). In describing his own role in opposition to Fleming's proposed development, Moore stated, "[I]f private citizens don't take positions on matters of public interest where would we be . . .? (Tr. 148).

Despite the opposition of Moore and others, the Planning Commission staff recommended approval of Evergreen II, again with certain conditions. One of those conditions was a 100-foot tree buffer between the Evergreen property and Shack Mountain (Tr. 81). Fleming saw the buffer condition as the work of Moore, especially since Moore had previously negotiated with Fleming for the purchase of a buffer that was strikingly similar, at least to Fleming, as the buffer that the Planning Commission required (Tr. 191-93).

Moore's opposition to Evergreen II was also successful. The Albemarle County Board of Supervisors denied approval of Evergreen II on January 28, 1976.

While he struggled through months of vehement opposition to Evergreen, Fleming saw that other properties close to his on the reservoir was being developed. He believed that white developers were sponsoring these developments with little public opposition and without the stringent conditions that were being imposed on Evergreen (Tr. 194). Although much of the stated opposition to Evergreen was based on potential pollution of the reservoir, Fleming did not believe that the developments sponsored by whites were facing the same opposition as Evergreen (Tr. 186, 194, 490).

Not only was Fleming faced with what he perceived as white opposition that was seemingly nonexistent for white developments, but his project also required the approval of virtually all-white boards of decision makers (Tr. 431). Fleming had designed Evergreen II to meet the objections raised against Evergreen I. Instead of facilitating approval, Fleming's compromises only led to new conditions, including the 100-foot tree buffer (Tr. 81). Fleming believed that the

white developers were not saddled with similar conditions, and he did not see Moore opposing those developers on the supposedly environmental pretext put forth against Evergreen. Rather than working with him, those on whom Fleming depended for approval of his plan seemed to be "conditioning" his project into oblivion (Tr. 490).[5]

Shortly before Fleming's development plans were denied for the second time, he placed a paid advertisement in the Charlottesville-Albemarle Tribune on January 8, 1976, and the same advertisement in the Cavalier Daily on January 15 and 16, 1976. The publication became the subject of the ensuing lawsuit (App. O).

Frustrated that his efforts to develop low and middle income housing were encountering stiff public opposition, while other developments were seemingly receiving little or no opposition, Fleming placed the advertisement, entitled

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5 Confronted with seemingly insurmountable opposition, Fleming finally abandoned his development plans and in 1980 dedicated the land upon which he had hoped to build Evergreen to the Nature Conservancy. The land is now a public park owned by the City of Charlottesville, Virginia, and open to persons of all races, creeds, and colors pursuant to a provision included at Fleming's insistence in the deed of dedication.

"Racism," to voice his opinion regarding the motivation of his opposition. The article elaborated Fleming's social and economic philosophy, and contained his opinion that the entire zoning controversy over his proposed development was a struggle between the "haves" and the "have-nots." Fleming analogized Moore's own estate with Jefferson's Monticello and contrasted what he perceived as Moore's beliefs with Jefferson's ideals. Part of the opinion contained Fleming's rhetorical statement that Moore "does not want any black people within his sight."

Moore sued Fleming for libel in the Circuit Court of Albemarle County, and in 1978 obtained a jury verdict. The Supreme Court of Virginia reversed that jury verdict and remanded for a new trial because of defective jury instructions (App. A; B).

Shortly before the second trial, Fleming moved to dismiss the action on the ground that his published opinion constituted protected political speech under the First Amendment to the United States Constitution. He also argued that the term "racism" was a subjective statement of opinion incapable of being proved either true or false. The motion was denied at a hearing held on October 7, 1982 (App. I).

At the second trial, held on October 21 and 22, 1982, Moore called Fleming as an adverse witness, and asked Fleming whether he really believed that Evergreen's opponents were, in fact, racially motivated. Fleming candidly responded, "I feel that a way then and I feel that a way today" (Tr. 194), a belief he restated during his testimony on at least six separate occasions (Tr. 182, 183, 197, 218, 234, 504). He asserted his conviction that the real ground for the opposition to Evergreen was "racism and not pollution" (Tr. 234) and that he felt his antagonists were "conspiring against me because I was black" (Tr. 194). He also explained that his opinion regarding the motivation of his opposition was well-grounded because he felt that a number of other developments sponsored by white developers in the reservoir area had encountered virtually no opposition (Tr. 194-97). Furthermore, Fleming stated, "I've never had a person to come to me and tell me he's racist to my face" (Tr. 201).

At the close of Moore's case, Fleming moved to strike the evidence on the grounds that there had been no proof of actual malice, that the word "racism" was not defamatory, and that, in the context of this public controversy,

Fleming's publication constituted a constitutionally privileged statement of opinion. The motion was denied (App. L). Fleming renewed his Motion at the close of all the evidence on essentially the same grounds, and it was again denied by the trial court (App. L).

During the argument on the jury instructions the trial court concluded as a matter of law that Moore was not a limited-purpose public figure (App. J), and granted Moore's instructions 9 and 10, which allowed the liability case to go to the jury on a theory of simple negligence rather than actual malice (App. M). Fleming contemporaneously objected to the ruling and to the instructions (Tr. 537-39).

After the jury returned its verdict, Fleming, raising the federal constitutional issues that he raises in this Petition for Writ of Certiorari, moved to set the verdict aside or, in the alternative, for a new trial (App. N). The Court denied both motions in a letter opinion dated April 21, 1983 (App. D).

Final judgment was awarded to Moore and entered on June 3, 1983 (App. E). Fleming noted his appeal to the Supreme Court of Virginia on June 30, 1983. The Supreme

Court of Virginia granted Fleming an appeal on four of his assignments of error (App. F). In the decision from which Fleming seeks a Writ of Certiorari, the Supreme Court of Virginia affirmed the compensatory and punitive liability verdicts against Fleming (App. G; H).

REASONS FOR GRANTING THE WRIT

This case presents four important questions of constitutional law receiving pronouncedly inconsistent treatment in the lower courts. The first question concerns the degree of constitutional protection to be accorded statements of opinion, capable of no forensic demonstration of truth or falsity, uttered during the heat of intense public debate, involving controversial issues affecting an entire community. The second issue concerns defining a "limited-purpose public figure" in the context of a local public controversy. The third concerns the proof required to establish clearly and convincingly the subjective state of mind necessary for a finding of New York Times actual malice. The fourth concerns whether all the black jurors may be struck in a civil case where race is at the core of the controversy.

ARGUMENT

In Bose Corp. v. Consumers Union, 104 S.Ct. 1949 (1984), this Court reaffirmed that an appellate court in a case raising First Amendment issues has an obligation to make an independent examination of the entire record in order to ensure that the judgment of the trial court does not constitute a forbidden intrusion on the exercise of free expression. 104 S.Ct. at 1958, 1965. The appellate court's obligation to make a searching inquiry of the entire record in such a case is necessary because "[t]he First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." Id. at 1961. A thorough examination of the record before this Court will show that the judgment against Fleming constitutes an unconstitutional abridgment of his right to free speech.

I. FLEMING'S ADVERTISEMENT IS A CONSTITUTIONALLY PROTECTED EXPRESSION OF OPINION

Limitations on civil libel exist because of its dangerous potential to constrain and inhibit freedom of speech and the communication of ideas. The United States Supreme Court recognized the constitutional dimension of these limitations in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), emphasizing that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Id. at 269.

The marketplace of ideas fostered and protected by the First Amendment necessarily includes expressions of opinion as well as statements of fact.[6] The United States Supreme Court reemphasized this protection in the landmark case of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In that case, the Court, in dicta, announced for the first time an absolute constitutional privilege for expressions of opinion:

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6 The common law doctrine of fair comment allowed critics a qualified immunity from libel actions so that they could express freely their views on subjects of public interest. See Restatement of Torts § 606 (1938).

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Gertz v. Robert Welch, Inc., 418 U.S. at 339-340.[7] As the

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7 As noted by the District of Columbia Circuit Court in a recent en banc decision, Ollman v. Evans, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3718 (February 28, 1985), this statement was clearly dicta, as the actual holding in Gertz was that private figures did not have to prove a false statement was made with actual malice in order to recover in a libel action. As the Ollman court pointed out, however, a majority of federal circuit courts have accepted the Gertz statement as controlling law. See McBride v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460, 1464 & n.7 (D.C. Cir. 1983); Bose Corp. v. Consumers Union, Inc., 692 F.2d 189, 192-94 (1st Cir. 1982), aff'd on other grounds, 104 S. Ct. 1949 (1984); Mr. Chow of New York v. Ste. Jour Azur S. A., No. 84-7198, slip op. at 5-6 (2d Cir. March 28, 1985); Avins v. White, 627 F.2d 637, 642 (3d Cir.), cert. denied, 449 U.S. 982 (1980); Church of Scientology v. Cazares, 638 F.2d 1272, 1286 (5th Cir. 1981); Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir.), cert. denied, 440 U.S. 960 (1979); Lewis v. Time, Inc., 710 F.2d 549, 552-53 (9th Cir. 1983); Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983). See also National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc., 705 F.2d 98 (4th Cir.), cert. denied, 104 S. Ct. 108 (1983) (finding that statement that charity was not "spending a reasonable percentage income on program services" was constitutionally protected opinion on the authority of Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)).

Indeed, the Gertz dictum was recently quoted with approval by this Court. See Bose Corp. v. Consumers Union, Inc., 104 S. Ct. 1949, 1961 (1984).

United States Court of Appeals for the District of Columbia recently noted, "Gertz's implicit command thus imposes upon both state and federal courts the duty as a matter of constitutional adjudication to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection." Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3718 (February 28, 1985). This constitutional privilege is rooted in a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. . . ." New York Times Co. v. Sullivan, 376 U.S. at 270.

Significantly, the First Amendment privilege established in Gertz is not limited solely to political matters. The privilege encompasses all matters of legitimate public debate, including governmental decisions on local zoning matters such as those involved in this case. Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970) (characterization of developer's tactics before city council to obtain zoning variances as "blackmail" held non-libelous opinion); Okun

v. Superior Court of Los Angeles County, 29 Cal. 3d 442, 175 Cal. Rptr. 157, 629 P.2d 1369, cert. denied sub nom., Maple Properties v. Superior Court of Los Angeles County, 454 U.S. 1099 (1981) (accusations in zoning controversy that developer and city council entered into "corrupt relationship" held non-libelous opinion).

This Court's task is to examine Fleming's allegedly libelous advertisement and to determine whether, in light of the public nature of the Evergreen controversy, the tone and internal context of the language in the advertisement and the public's perception of that language, the advertisement qualifies as protected opinion. The importance of this inquiry stems from the fact that the Gertz decision provided no guidance in identifying protected opinions, nor has the Court squarely addressed the issue since Gertz. Ollman, 750 F.2d at 975. Without this guidance, lower courts, like the trial court and Supreme Court of Virginia in this case, are failing to provide the constitutional protection that expressions of opinion are due.

Because most post-Gertz opinions agree that the distinction between fact and opinion is a matter of law,

courts attempting to parse the fine line between the two have endeavored to formulate methods to distinguish between them. The need for guidance from this Court as to the method for separating fact from opinion is graphically illustrated by the varied approaches utilized by the lower federal and state courts.[8] The authors of the Restatement (Second) of Torts have also developed their own standard.[9]

In a comprehensive decision rendered recently, the United States Court of Appeals for the District of Columbia

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8 See, e.g., Information Control Corp. v. Genesis One Computer Corp, 611 F.2d 781 (9th Cir. 1980) (a multi-factor test); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), cert. denied sub.nom., Hotchner v. Doubleday & Co., 434 U.S. 834 (1977) (a single-factor test); Shiver v. Apalachee Publishing Co., 425 So. 2d 1173 (Fla. Dist. Ct. App. 1983) (a "judgment call" test).

9 The Restatement (Second) of Torts § 566 provides:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion.

See Restatement (Second) of Torts Appendix at 368-70 and Supp. at 271-84 for decisions which have employed the Restatement approach. See also Christie, Defamatory Opinions and the Restatement (Second) of Torts, 75 Mich. L. Rev. 1621 (1977). The Ollman court disapproved of the § 566 approach. See Ollman, 750 F.2d at 984-85.

decided that an accusation of "Marxism" was constitutionally protected opinion. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984). In so holding, the court provided much-needed clarification on what qualifies as constitutionally protected opinion by developing a four part test to aid in determining whether the average reader would view a statement as one of fact or one of opinion:

> First, we will analyze the common usage or meaning of the specific language of the challenged statement itself. Our analysis of the specific language under scrutiny will be aimed at determining whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous. Readers are, in our judgment, considerably less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning. Second, we will consider the statement's verifiability--is the statement capable of being objectively characterized as true or false? Insofar as a statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content. And, in the setting of litigation, the trier of fact obliged in a defamation action to assess the truth of an unverifiable statement will have considerable difficulty returning a verdict based upon anything but speculation. Third, moving from the challenged language itself, we will consider the full context of the statement--the entire article or column, for

> example--inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content. Finally, we will consider the broader context or setting in which the statement appears. Different types of writing have, as we shall more fully see, widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion.

Id. at 979 (citations omitted). The court in Ollman also emphasized the importance of looking at the "totality of circumstances" in which the allegedly libelous statement appeared:

> [W]e are reminded by Gertz itself of our duty "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." For the contraction of liberty's "breathing space" can only mean inhibition of the scope of public discussion on matters of general interest and concern. The provision of breathing space counsels strongly against straining to squeeze factual content from a single sentence in a column that is otherwise clearly opinion.

Id. at 991-92 (citations omitted). Much like the term "Marxist" that was examined in Ollman, the term "racism" is commonly understood to be a term that is "hopelessly imprecise and indefinite." When examined in the context of the entire advertisement, viewed against the backdrop of the entire Evergreen controversy, Fleming's publication was no

more than an expression of opinion regarding the motivation of the opposition to his housing development.

Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), a pre-Gertz case bearing important similarities to this case, illustrates the broad rhetorical license permitted under the Constitution. In Greenbelt, a local real estate developer was engaged in negotiations with city council to obtain zoning variances that would allow him to construct a high-density residential development. Simultaneously, the city council was attempting to acquire land owned by the developer for construction of a high school. The concurrent negotiations gave rise to a heated local controversy and, in the course of the debate, the local newspaper ran two articles in which it repeated citizen characterizations of the developer's negotiations as "blackmail." The developer sued the newspaper for libel.

This Court, emphasizing that the news report containing the alleged libel described a matter of great local concern, held that "as a matter of constitutional law, the word 'blackmail' in these circumtances was not slander when spoken, and not libel when reported in the Greenbelt News

Review." 398 U.S. at 13. The Court's reasoning is directly applicable to this case:

> No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

Id. at 14. Greenbelt, therefore, stands for the proposition that the use of epithets and rhetorical hyperbole in the context of a public controversy of significant local concern is not libelous. See also Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) (union publication referring to named individuals as "scabs," "traitors," and as "lacking character" held non-libelous because mere hyperbole and used in a "loose, figurative sense").

In determining whether the use of the term "racism" was a constitutionally protected expression of opinion, this Court should examine the meaning attributed to the term by those who read the advertisement:

> The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.

Restatement (Second) of Torts § 563 (1977). Comment b to this section is even more explicit. It states that "[a]lthough the person making the communication intends it to convey a defamatory meaning, there is no defamation if the recipient does not so understand it." Id. at comment b; see Rudin v. Dow Jones & Co., 557 F. Supp. 535, 543 (S.D.N.Y. 1983). Given the circumstances surrounding the Evergreen controversy, Fleming's use of the term "racism" could only be understood as a vigorous epithet criticizing Moore's opposition as unreasonable.

In this regard, the trial court erred in accepting Moore's argument that the term "racism" has a precise, readily definable meaning. The same argument regarding the term "fascist" was made and rejected in Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977). There, William F. Buckley, Jr., a noted syndicated columnist, brought a libel action against Franklin H. Littell for labeling him a "fascist" and a "fellow-traveler of fascism" in Littell's book, Wild Tongues. Buckley advanced an extremely narrow

definition of "fascism" in support of his claim, just as Moore here relies on a narrow definition of "racism." Buckley defined "fascism" as a twentieth century movement developed around Mussolini in Italy that organized society around certain corporate objectives that subordinated individual freedoms and democratic government to those objectives. Buckley v. Littell, 539 F.2d at 891 n.7. The trial court adopted Buckley's narrow definition of the term and, accordingly, found Littell's statements libelous.

The Second Circuit reversed the trial court's finding that the term was libelous. In doing so, it rejected the narrow, technical definition advanced by Buckley and adopted by the trial court:

> We find. . .that the use of "fascist," "fellow traveler" and "radical right" as political labels in Wild Tongues cannot be regarded as having been proved to be statements of fact, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate, an imprecision which is simply echoed in the book.

Id. at 893.

The term "racism" is fraught with the same ambiguity and imprecision that color the term "fascism."[10] The

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10 See Note, Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege, 34 Rutgers

(continued)

term is a philosophical description, lacking the degree of definitional clarity necessary to make a communication libelous. "Racism" has come to be invoked in political debate to support or oppose policies that have a disproportionate impact on certain racial groups. Affirmative action programs are often reported as examples of "racism" in the popular press. Political actions of city councils and state legislatures are regularly criticized by opponents, and reported in the press, as exemplifying "racism." In short, the word has evolved into a generalized term of opprobrium, used by persons of all races, to protest policies or practices with which they do not agree. As the Buckley case teaches, such terms are squarely within the realm of ideas and opinions that are constitutionally protected.[11]

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L. Rev. 81, 83 (1981) (terms like "fascist," "anti-semite," and "racist" are "evaluative opinions," and are matters of inference and judgment not susceptible explicit proof or disproof).

11 Similarly, other courts have cited Buckley and held it protected opinion to call a professor a "political Marxist," Ollman v. Evans, supra; to label an attorney an "old Stalinist," Brower v. New Republic, Inc., 7 Media L. Rep. (BNA) 1605 (N.Y. Sup. Ct. June 5, 1981); to charge a labor

(continued)

No one reading Fleming's published opinion could fail to appreciate that it was a polemical tract vigorously advocating the cause of his Evergreen project. It is an obvious exercise in persuasion by passion and rhetoric and cannot reasonably be mistaken for a disinterested appraisal of the factual aspects of Evergreen. In tone and content, from Fleming's metaphorical comparison of Monticello to Shack Mountain through his concluding opinion that many will benefit from Evergreen, the advertisement is clearly the work of a partisan advocate bent on persuading the public, and perhaps the Board of Supervisors, into the belief that Evergreen will succeed despite the forces aligned against it.[12]

(continued from previous page)

leader with "communism," National Ass'n of Government Employees v. Central Broadcasting Corp., 396 N.E.2d 996 (Mass. 1979), cert. denied, 446 U.S. 935 (1980); and to describe an organization as having "elements of Nazi-style anti-Semitism," Holy Spirit Ass'n for the Unification of World Christianity v. Sequoia Elsevier Publishing Co., 426 N.Y.S.2d 759 (N.Y. App. Div. 1980).

12 In this regard it is significant that Fleming's advertisement was published before and not after the Board of Supervisors' final vote on Evergreen II.

The advertisement also plainly addresses Fleming's perception of the public political issues of "growth versus no-growth," and the economic class conflict between the "haves and have-nots" in the community. These themes, along with that of public opposition to low-income housing, have been repeated in public controversies throughout the country over the past decade. Fleming's views on these topics, and his identification of Moore as an unreasonable opponent of Evergreen, are the very essence of an expression of opinion on a matter of public interest.

Fleming's opinion should be given the necessary "breathing space" required by this Court in Gertz. See Gertz, 418 U.S. at 342. It should not be repressed by those who seek to focus narrowly on the constituent parts of the opinion, rather than on its whole. Such a focus is myopic and serves to limit the freedom of speech guaranteed Fleming under the First Amendment.

II. MOORE WAS A PUBLIC FIGURE FOR THE PURPOSES OF THE EVERGREEN ZONING CONTROVERSY

The trial court ruled as a matter of law that Moore was not a public figure for the purposes of the

controversy surrounding Evergreen (App. J). The trial court's ruling on this issue allowed Moore to recover compensatory damages merely by showing simple negligence, without proof of actual malice.[13] See Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

This Court has defined a "public figure" as one who has obtained such pervasive fame and notoriety as to be a public figure for all purposes, or alternatively, and more commonly, one who has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (emphasis added). The "limited-purpose public figure" mentioned in Gertz must meet two

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13 In awarding punitive damages, the jury did conclude that Moore proved that Fleming acted with actual malice. The Supreme Court of Virginia affirmed this finding of punitive liability (App. G; H). As Petitioner demonstrates in the next section of this Petition, however, Moore's evidence fell far short of establishing the New York Times actual malice that a public-figure plaintiff must clearly and convincingly prove before recovering compensatory damages, or that any plaintiff must prove before recovering punitive damages. Thus, instructing the jury that it could assess compensatory liability on a finding of negligence was reversible error.

requirements. First, he must be involved in a "public controversy," and second, he must inject himself voluntarily and purposefully into the nucleus of this controversy.

The lower court cases which have struggled to apply Gertz's definition are "[t]o be frank . . . in profound disarray." Harris v. Tomczak, 94 F.R.D. 687, 692 (E.D.Cal. 1982).[14] In this case, the trial court clearly failed to understand either aspect of the constitutional test for determining a public figure when it held that Moore was not a public figure in the context of the lengthy public debate surrounding Evergreen I and II. Therefore, this case presents an opportunity to correct the specific errors committed by the trial court and to give guidance to the lower courts in making public figure determinations.

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14 See also Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 30 n.147, 34 n.162 (1983) (noting that Gertz is being inconsistently applied by lower courts); Note, Defining a Public Controversy in the Constitutional Law of Defamation, 69 Va. L. Rev. 931, 944 & n. 78 (1983) (noting that courts are having extreme difficulty in defining what constitutes a public controversy).

A. The Evergreen Zoning Struggle Was A Public Controversy

In Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), this Court held that a vigorous local zoning controversy involving matters critical to local self-government amounted to a public controversy. Id. at 7-11. This holding is consistent with the most comprehensive definition offered by a lower court for determining when a public controversy exists: "If the issue was being debated publicly and it had foreseeable and substantial ramifications for non-participants, it was a public controversy." Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1297 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980).

Moore involved himself vigorously in the public debate regarding housing development. This issue had substantial ramifications for present and future residents of the Rivanna Reservoir area. As such, the debate concerned issues having a substantial effect upon persons other than the immediate protagonists at the numerous public meetings, and should therefore be classified as a matter of legitimate public controversy in accordance with the Bresler-Waldbaum line of

reasoning. In fact, Moore admitted that the development controversy was a matter of "public interest" (Tr. 147-48), and that his opposition to that development was for "the good of his neighbors and the county as a whole" (Tr. 66-67; PX 4).

B. Moore Was A "Limited-Purpose Public Figure" For The Purposes Of The Public Controversy Surrounding Evergreen

Most courts attempting to apply the definition of "public figure" offered in Gertz have resorted to a nebulous "I know it when I see it" test. See, e.g., Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861 (5th Cir. 1978). This is because "the public figure concept has eluded a truly working definition." Id.

In his concurrence in Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), Justice Blackmun, while agreeing that Wolston was not a public figure, commented that the Court seemed to hold "that a person becomes a limited-issue public figure only if he literally or figuratively 'mounts a rostrum' to advocate a particular view." 443 U.S. at 169 (Blackmun, J., concurring) (emphasis added). Although Justice Blackmun criticized this development, later decisions have

relied on his language and attempted to limit the definition of "limited-purpose" or "vortex" public figures to those persons who have actually mounted the rostrum to give vent to their concerns for the common weal. See, e.g., Harris v. Tomczak, 94 F.R.D. at 704.

In this case Moore mounted the rostrum, both literally and figuratively, to give strident voice to his opposition to the Evergreen development. The evidence established that Moore shadowed Fleming at every turn by appearing in person or through counsel at every substantive public meeting at which the Evergreen project was considered. Moore was no idle bystander on these occasions. He or his surrogates spoke publicly at five of the eight hearings held by the Albemarle County Board of Supervisors and the Planning Commission. Moreover, he spoke at the August 1975 Board of Supervisors meeting in support of conservation zoning along the reservoir. Although that meeting was not specifically concerned with Evergreen, it was clearly part and parcel of the efforts of Moore and others to block development along the reservoir, specifically Evergreen. In short, Moore was a determined adversary who opposed Evergreen with every means at his disposal."

Moore openly and publicly opposed Evergreen, not only to protect the value of his own property, but also to voice his concern about pollution in the reservoir (Tr. 64, 77, 79-80). He admitted at trial that his public involvement was purely voluntary, actuated by his own desire to promote what he perceived to be the best interests of his neighbors and the county as a whole (Tr. 66-67; PX 4). Moore injected himself not merely into the periphery, but to the very forefront of this particular local zoning controversy. Moore's own witnesses saw him as one of the most prominent leaders in the opposition to Evergreen (Tr. 289, 442).

The Circuit Court of Albemarle County, therefore, erred in ruling that Moore was a private individual rather than a public figure for the purposes of the Evergreen controversy. This error fatally tainted the court's instructions 9 and 10 which did not require Moore to prove New York Times actual malice clearly and convincingly in order to recover. By allowing Moore to recover on a theory of simple negligence, the Circuit Court unconstitutionally constricted the "breathing space" that Fleming's First Amendment freedom to comment uninhibitedly upon a public figure's role in a heated local

controversy affirmatively requires. See New York Times Co., 376 U.S. at 270-72. If allowed to stand, the Circuit Court's judgment would sanction and encourage "self-censorship" of political speech, and restrict dramatically the scope of public debate that this Court has repeatedly maintained must be uninhibited, robust, and wide-open.

III. MOORE FAILED TO ESTABLISH CLEARLY AND CONVINCINGLY THAT FLEMING KNEW THAT HIS PUBLISHED OPINION WAS FALSE, OR THAT FLEMING HAD A RECKLESS DISREGARD FOR WHETHER OR NOT HIS PUBLISHED OPINION WAS TRUE

In assessing punitive liability against Fleming, the jury at the trial of this matter concluded that Fleming acted with actual malice in placing the advertisement embodying his opinion regarding the motivation of the opposition to the proposed Evergreen development. The Supreme Court of Virginia affirmed that finding of actual malice (App. G; H).

In its review of the jury's decision, the Supreme Court of Virginia properly recognized that it had a duty to make "an independent examination of the record . . . to be certain that the judgment . . . does not constitute a forbidden intrusion on the field of free expression" (App. G at

G-43). See Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1965 (1984). The Supreme Court of Virginia, however, stated that it would evaluate the actual malice evidence "from an objective standpoint, not merely from a subjective perspective" (App. G at G-44). The refusal of the Supreme Court of Virginia to evaluate the actual malice evidence only from a "subjective perspective" violates the constitutional mandate announced by this Court in New York Times and its progeny that the First Amendment requires that actual malice be evaluated subjectively, not objectively. Moreover, that failure by the Supreme Court of Virginia, and its resulting affirmance of the finding of punitive liability, constitute an unconstitutional infringement of Fleming's First Amendment right of free speech.[15]

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15 Should the Court agree to review the decision of the trial court holding that Moore was not a limited-purpose public figure for purposes of the Evergreen controversy, the discussion in this section of the Petition regarding the lack of evidence of actual malice is applicable in establishing why the trial court committed reversible error in allowing the jury to find compensatory liability upon a simple negligence standard of proof. If Moore was a limited-purpose public figure, he could establish compensatory liability only after proving actual malice. As this section of the Petition establishes, he failed to meet that burden of proof.

To establish actual malice, Moore had to prove with clear and convincing evidence that Fleming knew that what was stated in the published opinion was false, or that Fleming published his opinion with reckless disregard for whether or not its contents were true. New York Times Co. v. Sullivan, 376 U.S. at 285-86. This standard of proof has properly evolved into one of the strictest burdens of proof that a plaintiff must satisfy. A burden of proof less strict would abridge the unalienable right of free speech itself. See Herbert v. Lando, 441 U.S. 153, 159-60 (1979).

To determine whether actual malice existed in this case, the jury's inquiry should have focused on Fleming's state of mind. Id. at 156-57, 161, 165. To find actual malice, the jury would have had to conclude that Fleming actually entertained a high degree of awareness of the probable falsity of his advertisement. Garrison v. Louisiana, 379 U.S. 64, 74 (1964). As this Court stated in St. Amant v. Thompson:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient [clear and convincing] evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

390 U.S. 727, 731 (1968) (emphasis added). This Court's review of the entire record will show that Moore's proof of actual malice fell far short of that necessary to support the lower courts' finding of actual malice.

There was a complete absence of evidence that Fleming had any question, much less serious doubt, as to the truth of his opinion. On the contrary, he was unswerving in his belief that his Evergreen opposition, selectively opposing his project while seemingly ignoring those of white developers, was racially motivated:

> Q. All right, Mr. Fleming. Mr. Fleming, did you feel that the groups that showed up to oppose the first Evergreen plan on conservation or environmental grounds were conspiring against you because you were black?
>
> A. I feel that a way then and I feel that a way today, that they was conspiring against me because I was black. And I had good reason to feel that a way . . .

(Tr. 194);

> Q. So the fact that these other projects were approved, proves that there was race at work against you?
>
> A. That's my contention yesterday and today.

(Tr. 197);

Q. Is it your contention that the opposition to your plan on historic, architectural grounds, was a sham?

A. Yes.

Q. It was really race that was motivating him?

A. Yes.

Q. All right. Prior to the publication of your ad what act or what words did Mr. Moore do that indicated to you that he believed in racism and he was using race against you?

A. Because he did not oppose the white development on the reservoir and only opposed mine as being black.

(Tr. 218-19);

Q. And that was Evergreen II?

A. That was Evergreen II, but between Evergreen I and Evergreen II, preliminary plan, they started out Evergreen I with ten conditions, and it is very flustrating (sic) because everybody else, I look around me happen to be white, is getting their preliminary plan approved, and I'm black and, and you don't know just how flustrating (sic) a person can get being a black person and seeing that the white can get what they want, so they added . . . it's always a hundred ways to say no, so they added from ten conditions, they added twenty conditions.

(Tr. 490);

Q. Did you believe what was in [the advertisement]?

A. I believed it to be true, 100 percent true.

Q. And why?

A. Because of actions and circumstances and facts, its actions and circumstances that I had been put under involving with Evergreen, with the Evergreen planning and development.

(Tr. 504). Nowhere in the record is there any evidence rebutting the unequivocal testimony establishing Fleming's sincere belief in the contents of his opinion.

In addition to failing to prove that Fleming entertained any doubt whatsoever regarding the truth of his opinion, Moore also failed to prove that Fleming exhibited the reckless disregard for the truth necessary for a finding of actual malice. The test is not whether a reasonable person would have published his opinion. The test is whether Fleming seriously questioned the truth of his opinion but nevertheless proceeded to publish it. Looking through Fleming's eyes at his world as it existed in January 1976, as this Court must do in evaluating the finding of actual malice, the only possible conclusion is that Fleming was not motivated by actual malice but by genuine frustration.

In the late 1960s, Fleming began the painstaking process of acquiring acreage suitable for development near the reservoir. As he patiently went about this process, he observed other development in the area and believed that no material opposition developed to this growth, all of which was initiated by white developers. But when Fleming announced his project, which happened to be for an integrated, lower middle class clientele, a bitter controversy erupted.

Fleming responded to this opposition with accommodation. He selected a lower development density, compared to other developments in the vicinity of the reservoir (Tr. 194, 488-89). When that did not succeed, and Evergreen I was rejected, Fleming reduced the planned density to 2.5 units per acre, a figure that was satisfactory to the Planning Commission and was said to be more palatable to the Board of Supervisors. In addition to lowering the density, Fleming attempted to address the alleged pollution objections as well by satisfying earlier objections relating to storm water run-off (DX 1).

While he was trying to appease his opposition and those that controlled the fate of his project, Fleming saw

that others were smoothly pursuing development plans. Two developments along the reservoir were approved just as Fleming introduced Evergreen II. To Fleming's knowledge, neither Moore nor the others who were publicly opposing Evergreen were doing anything to oppose the white developers.

Whether Fleming's published opinion was correct in an objective, factual sense is not the standard for determining whether actual malice existed. Fleming's opinion was indeed his sincere belief based on what he saw.[16]

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16 Moreover, Fleming's suspicions of racism were not as absurd as Moore will no doubt try to lead this Court to believe. James B. Dick, the County's zoning administrator effective July 1, 1976, was called as a witness at the trial of this matter. When Dick assumed his duties, Evergreen was still under consideration and Moore and others continued to oppose it. Asked whether he noticed anything unusual about the opposition, Mr. Dick replied:

> A. In the three years I served in, as the Zoning Administrator, I never had that sort of consternation that was going on. It was a lot of people involved, lot of shouting going on.
>
> . . .
>
> THE COURT: There's been no objection to that question. You may answer it.
>
> A. Yes, Your Honor. The only thing . . . that I heard about it is that several of the people were making a racial evaluation of Mr. Fleming's application.

(Tr. 464, 465, 467).

Fleming believed from past experience that no one would tell him to his face that their opposition to his project was racially motivated (Tr. 206). He was entitled to rely on circumstantial evidence indicating that his opposition might be racially motivated. Time, Inc. v. Pape, 401 U.S. 279, 290-91 (1971) (adoption of one of a number of possible rational, though mistaken, interpretations of an ambigious document held insufficient evidence of actual malice). All of the evidence he saw indicated such a motivation. The record does not contain a scintilla of evidence that Fleming in fact entertained any contrary belief or doubt. In sum, there was a complete absence of proof that Fleming acted with actual malice in publishing his opinion.

IV. MOORE'S STRIKING OF ALL BLACK JURORS VIOLATED, IN THE SPECIFIC CIRCUMSTANCES OF THIS CASE, FLEMING'S CONSTITUTIONAL RIGHT TO DUE PROCESS

The fact that Moore struck all the potential black jury members violates, in the specific circumstances of this case, Fleming's Fourteenth Amendment right to the due process of law. This was not an ordinary case of a land

dispute, or a contract dispute, or a personal injury dispute. It was a case where a black man was sued by a white man over the question of whether an expressed opinion of racism was defamatory to the white plaintiff.

Fleming does not urge a sweeping new principle of constitutional law that all juries must contain quotas of various population groups or even a fair cross-section of the community. He does not assert that a black defendant must always be tried by a jury with one or more blacks or a white defendant must be tried by a jury with one or more whites. Rather, Fleming urges that on the narrow facts of this case, where a white plaintiff sues a black defendant, and where the issue of race is at the core of the case, the plaintiff's deliberate striking of all black jurors denied him his right to due process.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Due process is a flexible concept that seeks to achieve

"fundamental fairness." It changes with the time, place, and circumstances. The Court has recently said the following about due process:

> "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Representing a profound attitude of fairness . . . 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . ."

Ingraham v. Wright, 430 U.S. 651, 675 (1977) (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)). Examining the time, place, and circumstances of this case, the striking of all the black jurors denied Fleming the fundamental fairness that due process guarantees.

In the minds of many, issues of racial prejudice and conflict remain fundamental, unresolved problems in America. This fundamental social condition cannot be forgotten the moment a citizen is tapped to become a juror. Black and white jurors bring markedly different perspectives on race relations with them as they step into the jury box. Despite their best intentions, neither group can fully

appreciate the perspective of the other where the specific topic of the lawsuit they must judge is the validity of a charge of racial motivation, itself an inherently subjective and ambiguous issue. For this reason, there is substantial doubt whether a jury composed entirely of white or entirely of black citizens can bring to bear a balanced perspective on an issue where race is central.

Fleming's case illustrates the unfairness of an all white or all black jury sitting in a case where race is the central issue. Consider the issue of actual malice. To resolve that issue, the jury was required to step into Fleming's shoes and determine from his perspective whether he knew that Moore was not a racist or acted with reckless disregard as to whether that was so. The difficulties of white jurors to assume that posture are obvious.

This Court must also consider the grossly excessive compensatory and punitive awards returned by the jury in this case—awards overturned by the Supreme Court of Virginia. The compensatory award was described by the Supreme Court of Virginia as "so out of proportion to the damages sustained to suggest that it is not the product of a fair and impartial

decision" (App. G at G-40), and the punitive award was described by the same court as "destructive" and so large as to "on its face [indicate] prejudice or partiality (App. G at G-46, G-47). These awards were rendered in a race case presided over by a white judge, tried to an all white jury, rendered in favor of a white man represented by white counsel, against a black man represented by black counsel. The Supreme Court of Virginia failed to explain why the jury prejudice that caused reversal of the damage awards did not require reversal of the findings of liability. Nevertheless, those awards are evidence that the racial imbalance of the jury infected all aspects of this jury trial.

This Court has recently granted a writ of certiorari to decide whether the Constitution prevents a prosecutor from peremptorily striking all black jurors in a criminal case involving a black defendant. Batson v. Kentucky, 53 U.S.L.W. 3757 (April 22, 1985). Fleming asks that the Court extend the Batson review to its logical conclusion and decide whether all black jurors may be struck peremptorily in a civil case pitting white against black where race is the central issue between parties of different race. The decision below is evidence of the constitutional infirmity of this practice.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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) To-Wit:
CITY OF RICHMOND)

D. Alan Rudlin, being first duly sworn, states that the foregoing **Petition For Writ of Certiorari** was deposited in the United States mail, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, and further states that to his knowledge that the mailing took place on the 2nd day of May, 1985, within the time permitted by the Rules of the Supreme Court for filing.

D. Alan Rudlin

Subscribed and sworn to before me this 2nd day of May, 1985.

My commission expires: 3/17/87.

Jane B. Wilkinson, Notary

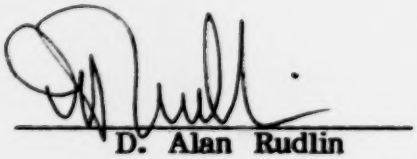
AFFIDAVIT OF SERVICE

STATE OF VIRGINIA)
) To-wit:
CITY OF RICHMOND)

D. Alan Rudlin, being first duly sworn, hereby states that on this 2nd day of May, 1985, he served counsel for Respondent with three (3) copies of the foregoing **Petition For Writ of Certiorari** by mailing the same, first-class postage prepaid, to counsel for Respondent at the following address:

Thomas E. Albro
Taggart, Gibson and Albro
P.O. Box 1585
Charlottesville, Virginia 22902

All parties required to be served have been served.



D. Alan Rudlin

Subscribed and sworn to before me this 2nd day of May, 1985.

My commission expires: 3/17/87.

Jane B. Wilkinson
Notary